equivalent provision of our Criminal Procedure Code which is section 316(a) which merely provides that the appellate judge may at the hearing of the appeal direct that "further inquiry be made *or* that the accused be re-tried *or* committed for trial as the case may be."

With respect however I do not think the presence or absence of those words referred to is crucial in the determination of the issue here. We have to go back to the basic concept of an order for retrial. Reference is always made to the classical case of *Nazimuddin* v. *Emperor*[3] where it has been established that when a conviction is set aside and a retrial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed. As regards the present case the order made by the appellate court in the earlier proceeding was that the case be remitted back to the Special President and the appellant be re-tried. The appellant contends that since the order was silent on the charges the retrial must following *Nazimuddin's case* be in respect of the original charges the subject of the appeal then.

The complaint is that before the plea was taken the charges were amended and in fact enhanced. At the outset I must make it clear that the issue here is not the moral question whether it was right or wrong for the prosecution to amend and enhance the charges from charges carrying a maximum sentence of fourteen years and seven years respectively to charges carrying the death penalty probably relying on the same facts. That is left to the conscience of the Public Prosecutor. But the real question is whether the prosecution was legally within their rights and powers to do so and what is the legal consequence of an order for retrial.

As regards the first question the answer is found clearly in my opinion in section 376(i) of our Criminal Procedure Code and as enunciated in *Long bin Samat* v. *Public Prosecutor*.[4] I do not think there is any doubt whatsoever that the Public Prosecutor has a right to amend, reduce, alter or enhance the charges or even to offer no evidence at any stage before judgment in a criminal proceeding. I will not therefore labour on this point. *Nazimuddin's case*[3] should not in my view be regarded as an authority for taking away the powers of the Public Prosecutor in a criminal proceeding.

As regards the second question the F.M.S. Appellate Court in the case of *Nawi bin Buyong* v. *Public Prosecutor*[5] unanimously agreed that there should be a retrial. In that case it was found, among other things, that there was an absence of a proper direction to the assessors by the trial judge and it was held that the proper order to make was an order of retrial on the original charges. Cussen J., held in that appeal that such an order of retrial, unless so expressly limited, is an order to re-try on the original charges. The first trial would be set aside and cancelled and the proceedings would commence *de novo* with the original charges, unless the prosecution decides at the retrial to proceed on a reduced charge.

Among the notes in the [1960] M.L.J. xlvi there is also a reference to the case of *Cheah Yew Fatt & Anor.* v. *Public Prosecutor*[6] where it was held that where a person was convicted on a charge which disclosed no offence, the trial was a nullity and there should be an order for retrial but not on the same charge. All that the court should do was to quash the conviction and leave it to the Public Prosecutor to bring an appropriate charge in his discretion.

I do not think there is any conflict between these authorities and what I have said earlier on the powers of the Public Prosecutor by virtue of section 376(i) of our Criminal Procedure Code. To sum up, an order of retrial would result in the trial to commence *de novo* and it is my opinion that even if the appellate judge had thought it fit to frame the charge or charges appropriate in his view for retrial that would not deprive the Public Prosecutor from exercising his own power under the Criminal Procedure Code to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings. It is on this point that I have, with respect, to disagree with the conclusion in *Lee Teck Hock's case*.[2]

The second and only other ground of the appeal is that the amended charges "would unfairly and gravely prejudice the fair trial of the appellant." I am not certain whether counsel meant the amended charges are in themselves unfair or prejudicial or whether the amended charges had brought into motion a new set of procedure which is unfair or prejudicial to the appellant as an accused. In any case this ground was not argued one way or another and as far as I can see it is also without merit.

For all the above reasons the appeal is dismissed.

Appeal dismissed.

Solicitors: *Paramjit Singh & Co.*

PUBLIC PROSECUTOR v. CHAI YEE KEN

[O.Cr.J. (Abdul Hamid J.) January 24, 1977]

[Kuala Lumpur — Federal Territory Criminal Trial No. 24 of 1976]

Criminal Law and Procedure — Attorney-General — Prosecution by — Grounds for — Discretion — Not open to court to inquire — Internal Security Act No. 82 ss. 47 and 57.

Arms and Ammunition — Possession — Internal Security Act No. 82, s. 57(1)(a) & (b).

It is not open to the court to inquire into the grounds for the Attorney-General's decision to prosecute the accused under section 47 of the Internal Security Act, nor is it open to the court to inquire into the merit of the exercise by the Attorney-General of his discretion. It is also not the duty of the prosecution to prove that the arms would be used for the purposes stated in the preamble of the Internal Security Act.

Cases referred to:-

(1) *Public Prosecutor* v. *Khong Teng Khen & Anor.* [1976] 2 M.L.J. 166.

(2) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

CRIMINAL TRIAL.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the Public Prosecutor.

K.C. Cheah (Lim Soh Wah and K. Pasupathy with him) for the accused.

Abdul Hamid J.: The accused is charged with two offences on the following charges —

(1) That you on the 11th day of February, 1976 at about 4.00 a.m. at house No. 3191 Jinjang North, Kuala Lumpur in the Federal Territory of Kuala Lumpur being a Security Area as proclaimed by the Yang Dipertuan Agung vide P.U.(A) 148 dated March 15, 1969, without lawful excuse did have under your control five firearms to wit, (a) one .22 Astra revolver Serial No. 115794, (b) one .38 Detective Special Serial No. 640674, (c) one .38 Webly revolver Serial No. 95583, (d) one .38 Smith & Wesson revolver Serial No. 88167, (e) one .38 Smith & Wesson revolver Serial No. 95233 without lawful authority and thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act No. 82 (Revised 1972).

(2) That you on the 11th day of February, 1976 at about 4.00 a.m. at house No. 3191, Jinjang North, Kuala Lumpur in the Federal Territory of Kuala Lumpur, being a Security Area as proclaimed by the Yang Dipertuan Agung vide P.U.(A) 148 dated March 15, 1969, without lawful excuse did have under your control ammunition, to wit (a) 33 rounds of .38 ammunition and (b) 41 rounds of 0.22 ammunition without lawful authority and thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act No. 82 (Revised 1972).

Upon these charges I convicted the accused and sentenced him to death.

Before I proceed to deal with the facts of the case I would first of all refer to the submission made by Mr. K. Pasupathy that P.U.(A) 148/69 made under section 47 of the Internal Security Act, 1960 has been superseded by Act 82 and consequently the Proclamation made thereunder cannot apply to Act 82.

I find no merit in the argument. It is true that Act 82 has replaced the Internal Security Act, 1960 and that section 47 and section 57 have now come under Part III but I do not think it can be argued that the inclusion of these sections under different parts in the revised laws has rendered the Proclamation inoperative. It is clear that by reason of section 2(1)(b) of the Interpretation Act, 1967 the Act applies to all laws, whether enacted before or after its commencement, revised under the Revision of Laws Act, 1968 and the Proclamation being a subsidiary legislation (section 3, Interpretation Act, 1967) therefore continues in force after the coming into force of Act 82. Also by reason of section 28 of the Interpretation Act, 1967 it seems clear that subsidiary legislation is unaffected by repeal of the authorising law where the provisions of such subsidiary legislation are not inconsistent with substituted provisions. Furthermore section 12 of the Revision of Laws Act, 1968 saves the existing subsidiary legislation as it, *inter alia*, provides that such legislation shall continue in force until otherwise provided.

Mr. Lim Soh Wah also appearing for the defence raised the question of the discretion of the Attorney-General to bring this case within the ambit of section 57. He argued that it is for the prosecution to prove grounds which bring this case within the ambit of the Internal Security Act. He also argued that mere possession of arms cannot come within the ambit of the said Act. It is for the prosecution to prove that the arms would be used for purposes stated in the preamble of that Act.

He further argued that even assuming the Attorney-General has a discretion it is still for the prosecution to prove the merit of the exercise of that discretion.

To my mind the Federal Court judgment in *Public Prosecutor* v. *Khong Teng Khen & Anor.*[1] answers the point raised. Suffian L.P. at page 171 in the course of his judgment said —

"It will be recalled that the definition of 'security offence' by regulation 2(1) of the 1975 regulations empowers the Attorney-General to certify that an offence against any other written law affects the security of the Federation, in which event the person accused of that offence becomes liable to be tried in accordance with the rules of procedure and evidence prescribed by the 1975 regulations, and Mr. Wilson argues that this provision gives the Attorney-General an arbitrary power to discriminate against persons as to whom he has given such a certificate; but with respect I do not think that there is merit in this argument because this power is consonant with the power expressly given to the Attorney-General by clause (3) of Article 145 which reads: '(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.' This court has dealt at length with this discretionary power of the Attorney-General in *Long bin Samat & Ors.* v. *Public Prosecutor.*"[2]

In my judgment it is not open to this court to inquire into the grounds for the Attorney-General's decision to prosecute the accused under section 47 of the Internal Security Act, nor is it open to the court to inquire into the merits of the exercise by the Attorney-General of his discretion. I am also of the view that it is not the duty of the prosecution to prove that the arms would be used for the purposes stated in the preamble of the Internal Security Act.

On the facts the prosecution adduced evidence to show that on February 2, 1976 at about 4.00 a.m. Insp. Aziz (PW2) and a police party raided a squatter hut No. 3191 in Jinjang North. On arrival at the hut Cpl. Mokhtar (PW3) was asked to kick open the front door and thereupon Insp. Aziz together with Cpl. Mokhtar, DPC Ong Hooi Hong (PW4), DPC Zuki and DPC Abdul Rahman rushed into the hut. The rest of the police party cordoned off the hut.

In the hall of the hut a male Chinese the younger brother of the accused was sleeping. Zuki was instructed to go into the room on the left while Insp. Aziz, Mokhtar and Ong went into another room on the right, (identified as rooms B and B1 respectively from the sketch plan (Ex. P17)). In room B there was an old lady accused's mother and two girls the sisters of the accused. In room B1 the accused was found sleeping on a wooden platform two feet high. The door to room B1 was shut and Insp. Aziz gained entry into the room by pushing open the door and the object, a stool or something, placed behind the door to keep it shut. Insp. Aziz shook the accused up and when the accused woke up he was instantly

handcuffed to Ong. The accused was questioned about the gun and a brief search was also made. It is given in evidence that some cash and an identity card and one or two keys were found in a trouser pocket hanging on the wall in the room. One of the keys was later tried on to the padlock hooked on to the hinge outside the door leading to room B1 and it fitted. The padlock and the keys were not produced as exhibits.

The accused was taken out of the room to the hall and there he was questioned about the gun. The accused denied that he had the gun. It was at this point that Insp. Aziz told the accused interpreted by Ong that he would be forced to arrest the whole family if he did not reveal the truth. The accused told Insp. Aziz to leave his mother, brother and sisters alone and he would tell where he had kept the gun. The accused who was still handcuffed to Ong pulled Ong into the room and the same room where he was found sleeping followed by Insp. Aziz and Mokhtar. The accused then said that the guns were underneath the wooden platform. From underneath the platform Insp. Aziz recovered a green radio box (Ex. P3). On examination he found five guns and a quantity of loose ammunition. In the same room seven sets of motor cycle number plates and one other motor cycle number plate were found. The five guns recovered were — (a) one .22 Astra revolver Serial No. 115794, (b) one .38 Detective Special Serial No. 640674, (c) one .38 Webly revolver Serial No. 95583, (d) one .38 Smith & Wesson revolver Serial No. 88167 and (e) one .38 Smith & Wesson revolver Serial No. 95233.

The ammunition found in the box including those loaded in the guns were those of .22 and .38.

The prosecution also adduced evidence from Cpl. Mokhtar and DPC Ong. Both Mokhtar and Ong substantiated the testimony of Insp. Aziz. Mokhtar stated that he found the cash, identity card and the keys in the trouser pocket the same pair of trousers that the accused put on to go to the police station. Ong testified that he interpreted the questions put by Insp. Aziz. He asked the accused to tell the truth as otherwise his brother, mother and sisters would be taken to the police station for interrogation and thereupon the accused said, "All right I'll take you to get it." The accused then pulled him into the room.

Insp. Aziz was cross-examined at length by Mr. Lim Soh Wah counsel for the defence. He agreed that the police party was going on fire arm raid. He said that he searched the cupboard inside room B1, however, as the room was stuffy he pulled the accused out into the hall to further question him. No search was made underneath the platform. It was put to Insp. Aziz that when he entered the room he found the pistols. This was denied. Insp. Aziz was also asked whether all the clothes in the cupboard belonged to the accused. He stated that he could not say. He was also cross-examined about the trousers alleging that the trousers belonged to one Chye Lin Kin. To this question Insp. Aziz replied that he could not say.

It is clear from the line of questioning that the defence intention was to show that the accused was not the sole occupant of the room and that the pistols found in the room belonged to someone else probably Chye Lin Kin.

In the submission made by Mr. Lim Soh Wah it is contended that the evidence produced must be evidence admissible and therefore the statement made by the accused should not have been admitted as it was made as a result of threat. He referred to Regulation 17 of the Essential (Security Cases) (Amendment) Regulations, 1975 which reads as follows —

> "The court shall decide on the guilt or innocence of the accused only at the conclusion of the case for the defence, and it shall so decide upon hearing and considering the evidence of both the prosecution and the defence as a whole, having regard to the justice of the case, without regard for the technicalities of the rules of evidence or procedure, or for any defect concerning the charge."

Counsel also referred to section 75 of Act 82 concerning admission of statement in evidence. The counsel is quite right in submitting that the statement made by the accused in the present case shall not be admissible if the making of the statement appears to the court to have been caused by threat. The threat according to the defence was made by Insp. Aziz when he told the accused that he would be forced to arrest the whole family if he did not reveal the truth. In considering the effect of the words uttered by Insp. Aziz, whether or not they amounted to threat, the court has borne in mind that the pistols were found in a house occupied at the relevant time by the accused, his brother, mother and sisters. To my mind Insp. Aziz was expressing nothing more than what he was compelled to do in the execution of police duties under those circumstances. For this reason I am unable to hold that the pointing of the place by the accused where the pistols were kept amounted to a statement which had been caused by threat. Even if I am wrong and it is held that the statement made by the accused leading to the recovery of the pistols was caused by threat my finding, however, is that there is in the present case overwhelming evidence to show that the accused had exclusive control of the five pistols without lawful authority.

The accused was at the material time the sole occupant of the room and the pistols were found in a box under a low platform he was found sleeping on. There was no evidence that the room was occupied by someone else other than the accused. Evidence was produced to show that there was a padlock hooked on to the hinge at the door and although the padlock was not produced as exhibit I am satisfied that on the testimony of the prosecution witnesses that it was in fact there. The accused had the key which could be used to unlock the padlock giving rise to the further inference that the accused had exclusive occupation of the room in question. The defence line of questioning was to show that one Chye Lin Kin had at some time occupied the room in question and some doubt has therefore been cast upon the prosecution concerning the person who actually had control of the pistols. It is disclosed that Chye Lin Kin was the elder brother of the accused, indeed Chye Lin Kin testified that he did stay in that house but at no time did he say that he occupied the room where the pistols were found. In fact in his testimony he stated

that one room was occupied by his mother and sisters and the other room was occupied by his brother the accused. And the accused himself said in his statement from the dock that his brother "the Black Devil" was staying with his elder brother and he did not at any time allege that his brother had at any time shared that room with him just as Chye Lin Kin made no mention that he ever shared the room with the accused.

In my judgment the materials before the court warrant a finding that the accused was in sole occupation of the room where the pistols were found and the evidence surrounding the recovery of the pistols and the circumstances under which the pistols were recovered clearly establish that not only had the accused exclusive control of the pistols but he had full knowledge of their presence.

After considering very carefully both the prosecution and the defence evidence I am satisfied beyond any reasonable doubt that the accused was guilty of the offences charged and I convicted the accused for the same. Consequently I passed the only sentence known to law, namely, death.

Order accordingly.

Solicitors:

SINAPPAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Ali Ag. C.J. (Malaya)) February 11, 1977]
[Kuala Lumpur — Selangor Criminal Appeal No. 63 of 1976]

Criminal Law & Procedure — Seizure — Forfeiture — Telecommunications Act, 1950, ss. 38(1)(b), 39(2) and 43(1).

Telecommunications — Radio communication apparatus — Possession without licence — Seizure — Forfeiture — Telecommunications Act, 1950, ss. 38(1)(b), 39(2) and 43(1).

In this case the appellant, who was charged with an offence under section 38(1)(b) of the Telecommunications Act 1950 of having possession without a licence of radio communication apparatus with a view to sale, pleaded guilty and was convicted. He was fined $100 and, in addition, the radio communication apparatus which was seized by the police was ordered to be forfeited. His appeal is against the order of forfeiture on the ground that section 43(1) of the Act which applies to an offence under section 38(1)(b), gives the magistrate no power to order forfeiture.

Held: in the circumstances of this case it was clear that although properly armed with a search warrant the police had no right to seize the radio communication apparatus as there was no evidence to show that it had been installed or worked within the meaning of sections 38(1)(a), 39(1) or 39(2) of the Act. The seizure of the apparatus was therefore wrongful and not authorised by law. It followed therefore, that no order of forfeiture could validly be made in respect of the article or apparatus which was wrongly seized.

CRIMINAL APPEAL, CERTIFICATE UNDER SECTION 319 OF THE CRIMINAL PROCEDURE CODE.

Matthew Thomas for the appellant.

Ee Chin Seng (Deputy Public Prosecutor) for the respondent.

Ali Ag. C.J. (Malaya): The appellant, charged with an offence under section 38(1)(b) of the Telecommunications Act 1950 (Revised 1970 Malaysia Act No. 20) of having in possession without a licence radio communication apparatus with a view to sale, pleaded guilty and was convicted. He was fined $100 and, in addition, the radio communication apparatus which was seized by the police was ordered to be forfeited. His appeal is against the order of forfeiture on the ground that section 43(1) of the Act which applies to an offence under section 38(1)(b), gives the magistrate no power to order forfeiture.

In this case the radio communication apparatus was seized by the police, having obtained a search warrant from the magistrate under section 39(2) of the Act, which provides for the granting of such warrant if the magistrate is satisfied on information on oath that there is reasonable ground for believing (a) that a radio communication station has been established or (b) that any radio communication apparatus has been installed or worked without a licence in any place in Malaysia or on board any local vessel or local aircraft. If there had been evidence of either (a) or (b) against the appellant he would no doubt have been charged with an offence under section 38(1)(a) and that if he was convicted, would result in the forfeiture of the radio communication apparatus which was properly seized. Such forfeiture is authorised by section 39(1). But the appellant was not so charged clearly because there was no evidence of either (a) or (b) against him. He was charged with an offence under section 38(1)(b) and the question arises whether in terms of section 43(1) there is power to order forfeiture.

The learned magistrate was of the view that there is power to order forfeiture; not only that, she said forfeiture was mandatory. She was no doubt construing the words "in addition to the forfeiture of any article seized" in section 43(1).

In the circumstances of this case it is clear that although properly armed with a search warrant the police had no right to seize the radio communication apparatus as there was no evidence to show that it had been installed or worked within the meaning of sections 38(1)(a), 39(1) or 39(2) of the Act. The seizure of the apparatus was therefore wrongful and not authorised by law. It follows therefore, that no order of forfeiture can validly be made in respect of the article or apparatus which was wrongly seized.

For the reasons above stated I allowed this appeal and set aside the order of forfeiture.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*